

## FIRST AMENDMENT

**Lane v. Franks, --- U.S. --- (2014)**

**Decided June 19, 2014**

**FACTS:** In 2006, Lane was hired to oversee a program (CITY) operated by the Central Alabama Community College (CACC). At the time, the program faced serious financial concerns and Lane did a comprehensive audit. He learned that one employee, Schmitz, who was also a state legislator, was not reporting to her office at the program to perform her duties. He was not successful in changing her conduct, so he went to the CACC president and attorney, who warned him against the political ramifications of firing Schmitz. He went back to Schmitz and admonished her to “show up to the ... office to serve as a counselor.” She refused and was promptly fired. Schmitz then told another employee that she would get back at Lane for firing her.

Schmitz’s termination drew a great deal of attention, especially from the FBI.<sup>1</sup> Lane testified before a federal grand jury and Schmitz was indicted for theft and mail fraud. Lane again testified at two subsequent trials and, ultimately, Schmitz was convicted.

During that time, CITY experienced budget shortfalls. Franks, the new president of CACC, decided to lay off 29 program employees, including Lane, but ultimately rescinded all but two of those firings – one of the two being Lane. (Franks later stated he considered Lane to be in a different category than the rest of the employees, as he was the director.)

Lane sued Franks<sup>2</sup> under 42 U.S.C. §1983, arguing that “Franks had violated the First Amendment by firing him in retaliation for his testimony against Schmitz.” The U.S. District Court ruled in favor of Franks, finding that although there were questions as to Franks’ “true motivation” for the termination, that Franks would not have had reason to know that Lane’s speech was protected. The District Court ruled that because the substance of Lane’s testimony involved information he’d learned as part of his work, his speech might be considered “part of his official job duties and not made as a citizen on a matter of public concern.”

Lane appealed. The Eleventh Circuit Court of Appeals affirmed, relying, as did the trial court, on Garcetti v. Ceballos.<sup>3</sup> Lane filed for certiorari and the U.S. Supreme Court granted review.

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<sup>1</sup> The program had federal funding.

<sup>2</sup> Franks resigned during the lawsuit, and Burrow, the new president, was substituted as the official defendant.

<sup>3</sup> 547 U.S. 410 (2006).

**ISSUE:** Is testifying truthfully as to matters learned in the course of one's employment protected speech?

**HOLDING:** Yes

**DISCUSSION:** The Court began, noting that "speech by citizens on matters of public concern lies at the heart of the First Amendment, which 'was fashioned to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people.'"<sup>4</sup>

Further:

This remains true when speech concerns information related to or learned through public employment. After all, public employees do not renounce their citizenship when they accept employment, and this Court has cautioned time and again that public employers may not condition employment on the relinquishment of constitutional rights."<sup>5</sup> There is considerable value, moreover, in encouraging, rather than inhibiting, speech by public employees. For '[g]overnment employees are often in the best position to know what ails the agencies for which they work.<sup>6</sup> The interest at state is as much the public's interest in receiving informed opinion as it is the employee's own right to disseminate it.<sup>7</sup>

In Pickering v. Board of Education, however, the Court had given government employers some ability to control the speech and actions of its employees. It created a balancing test to analyze "whether the employee's interest or the government's interest should prevail in cases where the government seeks to curtail the speech of its employees." If the speech involves a matter of public, rather than private, concern, the speech must be permitted. However, under Garcetti, the Court developed an additional two-step inquiry:

The first requires determining whether the employee spoke as a citizen on a matter of public concern. If the answer is no, the employee has no First Amendment cause of action based on his or her employer's reaction to the speech. If the answer is yes, then the possibility of a First Amendment claim arises. The question becomes whether the relevant government entity had an

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<sup>4</sup> Roth v. U.S., 354 U.S. 476 (1957).

<sup>5</sup> Keyishian v. Board of Regents of Univ. of State of N. Y., 385 U. S. 589 (1967); Pickering v. Board of Education, 391 U. S. 563 (1968); Connick v. Myers, 461 U. S. 138 (1983).

<sup>6</sup> Waters v. Churchill, 511 U.S. 661 (1994).

<sup>7</sup> San Diego v. Roe, 543 U.S. 77 (2004).

adequate justification for treating the employee differently from any other member of the general public.

In short, in Garcetti, the Court ruled that when a public employee speaks as to their official duties, they “are not speaking as citizens for First Amendment purposes and the Constitution does not insulate their communications from employer discipline.”

The Court then moved on to the question raised by Lane, “whether the First Amendment protects a public employee who provides truthful sworn testimony, compelled by subpoena, outside the scope of his ordinary job responsibilities.” Clearly his testimony concerned a matter of public concern and “truthful testimony under oath by a public employee outside the scope of his ordinary job duties is speech as a citizen for First Amendment purposes.” This remains the case “even when the testimony relates to his public employment or concerns information learned during that employment.” The Court noted that “sworn testimony in judicial proceedings is a quintessential example of speech as a citizen for a simple reason: Anyone who testifies in court bears an obligation, to the court and society at large, to tell the truth.” Apart from any employer obligations, the Court agreed, the employee has a clear obligation “to speak the truth.”

Court precedent has “recognized that speech by public employees on subject matter related to their employment holds special value precisely because those employees gain knowledge of matters of public concern through their employment.” In Roe, the court observed that Government employees “are uniquely qualified to comment” on “matters concerning government policies that are of interest to the public at large.” It is even more critical in the context of this case, public corruption, which often require fellow public employees to testify.

The Court continued:

It would be antithetical to our jurisprudence to conclude that the very kind of speech necessary to prosecute corruption by public officials – speech by public employees regarding information learned through their employment – may never form the basis for a First Amendment retaliation claim. Such a rule would place public employees who witness corruption in an impossible position, torn between the obligation to testify truthfully and the desire to avoid retaliation and keep their jobs.

The Court agreed that Lane’s speech was “speech as a citizen.” Further, it also clearly involved a matter of public concern, as defined as speech that can ‘be fairly considered

as relating to any matter of political, social, or other concern to the community,' or when it 'is a subject of legitimate news interest; that is, a subject of general interest and of value and concern to the public.'"<sup>8</sup> The analysis turns on the "content, form, and context" of the speech. The speech in this case, which was sworn testimony, was fortified by being made "under oath" and under circumstances that had "the formality and gravity necessary to remind the witness that his or her statements will be the basis for official governmental action, action that often affects the rights and liberties of others."<sup>9</sup>

The final inquiry was whether CACC had "an adequate justification for treating the employee differently from any other member of the public" based on its internal needs. Here, however, the CACC's "side of the Pickering scale is entirely empty," there was simply no "government interest that tips the balance in their favor." Lane's testimony was not false or erroneous, and it did not disclose any "sensitive, confidential, or privileged information." The Court ruled that he was entitled to First Amendment protection.

The Court did, however, agree that Lane's claims against Franks, as an individual, must be dismissed under qualified immunity, as the matter had not been clearly established at the time Franks terminated Lane. This did not, however, resolve the claim against the new president of CACC, who represented the position (president) in her official capacity.

The U.S. Supreme Court affirmed the decision of the Eleventh Circuit with respect to the individual claim against Franks, but reversed the dismissal of the remaining claims. The court remanded the case for further proceedings.

Full Text of Opinion: [http://www.supremecourt.gov/opinions/13pdf/13-483\\_9o6b.pdf](http://www.supremecourt.gov/opinions/13pdf/13-483_9o6b.pdf)

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<sup>8</sup> Snyder v. Phelps, 562 U.S. – (2011).

<sup>9</sup> U.S. v. Alvarez, 567 U.S. --- (2012).